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IN THE

Supreme Court of the United States

October Term, 1957

No. 759

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, *Appellant*,

v.

WILLIAM (BILL) ATKINSON, JACK BARSBY, ALFRED E. BRAIN, CLARENCE (PETE) CARPENTER, RUSSELL A. CHEEVER, HARRIET CRAWFORD, individually and on behalf of all other instrumental musicians similarly situated, *Appellees*.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, *Appellant*,

v.

JOHN H. ANDERSON, JR., BURNETT F. ATKINSON, ROBERT BAIN, EDWIN VANCE BEACH, ROLAND E. BUNDOCK, LAWRENCE B. BUNKER, GEORGE CALLENDER, individually and on behalf of all other instrumental musicians similarly situated, *Appellees*.

On Appeal From the Supreme Court of California

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEALS OR TO AFFIRM THE JUDGMENTS

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Appellant Federation has, in its Jurisdictional Statement, already set forth the applicable facts and legal authorities. This brief is, therefore, limited to responding to the statements and arguments which appear in appellees' motion.

Correction of the Facts

Appellees contend that this Court may on these appeals consider as facts only those allegations which appear in the complaints and in the petitions for mandate to the California District Court of Appeal. In stating the nature of the actions appellees have relied heavily upon their own unproved self-serving allegations. They also relied upon the summary of their own complaints appearing in the opinion of the District Court of Appeal, which they repeatedly denominate "factual summary in the opinion of the California District Court of Appeal", thus implying that the District Court of Appeal had made findings of fact. Actually, the District Court of Appeal purported to do no more than to summarize the complaints and, in relying upon these summaries, appellees are citing only themselves. In *Atkinson,* they concede that their version of the facts was later rejected when the California Superior Court denied, *in toto* and upon the merits, their motion for a preliminary injunction. And in *Anderson,* the same court denied on the merits the major relief sought by them (but made no findings of fact in rendering its decision).

While appellees thus seek to put blinders upon this Court's examination of the record which has been certified here, they themselves have, as we point out below, gone entirely outside the record in purporting to state the facts, and we deny the truth of the allegations so made by them.

Appellees' position, that this Court is limited to their allegations in the complaints and in the petitions for mandate is predicated upon the fact that appellant Federation demurred to their petitions. They overlook, we assume, the fact that their petitions incor-

porated by reference the entire record in the Superior Court, as it then existed. Thus, the *Anderson* petition alleged that:

> "A transcript of the oral and other evidence submitted to the respondent Superior Court, as well as the stipulations and arguments of respective counsel, is being filed with this Court and is by this reference incorporated herein." (R. Vol. 1, Petition for Writ of Mandate, p. 10)

An identical statement appears in the Petition for Mandate in *Atkinson*, pages 11-12. Hence, when the Federation demurred, its position was merely that upon the entire record, appellees were not entitled to the writ of mandate.

Anderson Case

Appellees assert that 87 phonograph recording companies were served as defendants. They go entirely outside the record to allege further that jurisdiction would not be attainable outside of California with respect to a great majority of them.

What the record does show is that more than one-third of the defendant companies were not parties to the agreements on which the complaint is founded—and this proportion assumes that in each case where the name of a defendant was similar to that of a signatory, it was the signatory that was named. Furthermore, of the signatories to the agreements, well over half have never operated. Seven companies do about 95 per cent of the domestic business and most of these have their principal offices in New York City (R. Vol. 2, Cluesmann aff. in *Anderson*, p. 16; Vol. 2, Ex. p. 5 to Kenin aff. of Jan. 2, 1957).

It is also admitted on the record that two-thirds of the phonograph records produced in the United States are recorded in New York City. The agreements involved in this litigation were negotiated and made in New York City (R. Vol. 2, Cluesmann aff. in *Anderson*, pages 2, 12). Under the agreements, the Trustee's sole office is in New York City and all payments are required to be made there, and the agreements are to be construed under New York law (R. Vol. 2, complaint, Ex. B, par. 2(h), 8).

The action brought by appellees involves the Trustee's conduct solely in New York City. Moreover, the appellees are not suing on any transaction or connection which they have had with the Trustee, but solely upon employment with defendant companies and upon their connection with the Federation.

Two sets of agreements are here involved, all of which were made in New York City. One set of agreements are the trust agreements between the Trustee and some defendant companies. The Federation is not a party to these trust agreements. Under these trust agreements, signatory companies have agreed to make specified payments to the Trustee and, in addition, to pay whatever other sums they may agree upon with the Federation.

The second set of agreements are the collective agreements between the Federation and some of defendant companies. Under these, the companies agreed to make additional payments to the Trustee, to be governed by the terms of the trust agreements. These payments are minor compared with those explicitly and directly required by the trust agreement.

Appellees, in their action, contend that the two sets of payments, both those directly made under the trust agreement and those made by cross-reference to the labor agreement, belong to appellees and not to the Trustee.

The Federation denies the allegations set forth in the Motion at pages 5-6 concerning the details of the 1953-54 negotiations, and the allegations that musicians "are still obliged to work at their 1946 wage scale." The facts are set forth in the record at Vol. 2, Cluesmann aff. In *Anderson*, pages 3-4, 12-14; see also Edelstein aff., pages 3-7.

Nor is it true that the collective agreement refers to payments to the Trustee as being for the services of the persons covered by the agreement in making recordings. The agreement states that musicians shall be paid not less than the minimum scale set forth in Exhibit "A" of the contract. Exhibit "A" contains all the provisions relating to amounts of money. It establishes not only the minimum scales but also the payments to the Trustee. Nowhere, however, are the payments to the Trustee referred to as, or made part of, the scale, nor are they anywhere in the contract designated as compensation for services.

Nor was it admitted below, as appellees assert, that payments to the Trustee are treated as a labor cost for musicians' services.

Atkinson Case

Here, appellees assert that 76 defendants have been served, but they fail to point out that the record demontstrates that only 11 of the named defendants were signatories to the contracts here involved, and

not all of these eleven have been served. (R. Vol. 3, Cluesmann aff. in *Atkinson,* p. 16; for list of signatories see Vol. 4, Transcript for Jan. 10, 1957, pp. 3-5).

Appellees again go outside the record to assert that personal service over a majority of defendant companies is attainable only in California. The Federation denies that any of the signatories cannot be served in New York.

The assertion that 97 per cent of motion picture recording giving rise to the "*diverted payments,* has taken place and *still takes place* in California" (Emphasis supplied) is without support in the record. The motion pictures here involved are not current ones since 98 per cent were produced prior to April 1946 (R. Vol. 3, Cluesmann aff. in *Atkinson,* p. 8). Moreover, the payments to the Trustee arose not from services rendered by musicians in California but from nationwide bargaining power of the Federation (Id. p. 9) and, hence, are in no sense "diverted payments."

The contractual situation is more complicated here. Motion pictures produced prior to April 1, 1946 were not subject to any restriction in the Federation agreements with respect to television use. Commencing April 1, 1946, such a restriction was imposed in an agreement negotiated and made in New York City applicable to films then owned (and previously produced) as well as those thereafter made. The purpose of this clause was to protect live employment opportunities for musicians in television broadcasting. Subsequently many producers sold their old films, and the distributors, in New York City, entered into agreements with the Federation and into separate agreements with the Trustee (R. Vol. 3, Cluesmann aff. in *Atkinson,* pages 4, 10-11).

Thus, there are here involved trust agreements between the distributors and the Trustee under which the distributors agree to make, in New York, to the Trustee, specified payments as well as such additional payments as might be agreed upon between the distributor and the Federation. The Federation is not a party to the trust agreements.

There are also agreements between the Federation and the distributors in which the Federation released films for television and the distributors agreed to make specified payments to the Trustee (in addition to those directly provided for in the trust agreements). The major payments are those directly provided for in the trust agreements. Those Federation agreements made prior to June 1955 provided for payments to the musicians who originally recorded the films, and a few of these were amended prospectively to provide for payments to the Trustee in lieu of future payments to musicians (R. Vol. 3, Cluesmann aff. in *Atkinson*, p. 16).

Appellees err in asserting that any contracts were changed by unilateral edict of the Federation or that the amendments had any retroactive operation. There not only is no proof in the record to that effect, but the uncontradicted proof is to the contrary.

In this action, too, appellees claim that the sums payable to the Trustee under the two sets of agreements with the distributors belong to them and not to the Trustee. Again, appellees are not suing on any transaction they have had with the Trustee nor on any transaction which the Trustee has had, even in part, in California.

* * *

The material which appellees include in section "D" on pages 10-12 of the Motion consists of their bare allegations, which they have been unable to prove, or consist of matters entirely outside the record, such as the references to witnesses to be called. It is evident from the actions themselves that they revolve about contracts of the Federation and of the Trustee and the negotiation of those contracts. The events involved all took place in New York and the only reasonable assumption is that most of the witnesses will be from New York.

I

THE JUDGMENTS APPEALED FROM ARE FINAL. NO VALID GROUND HAS BEEN ADVANCED TO SUPPORT THE SUGGESTION THAT THEY ARE NOT RIPE FOR REVIEW

Appellees urge that the final judgments in the mandamus proceedings are not in fact "final" because they do no more than direct the holding of hearings in other actions. It is claimed that this Court has never taken jurisdiction on appeal from judgments in such proceedings except where the mandamus judgment, for all practical purposes, ended the underlying litigation or determined the ultimate result. The authorities, however, are to the contrary.

This Court discussed the very contention made by appellees in its opinion in *Detroit & M. R. Co.* v. *Michigan* R. Com., 240 U.S. 564, at 570-571:

> "Our jurisdiction is called in question upon the ground that the judgment is not final . . . because the judgment does not determine the merits and end the litigation. But, as this court has said, 'all judgments and decrees which determine the particular cause' are final in the sense of the statute.

> (citations) This view has prevailed through a century of practice in reviewing judgments and decrees dismissing causes for want of jurisdiction or for other reasons not decisive of the merits. And it is settled that a proceeding in mandamus is an independent adversary suit, and a judgment awarding or refusing the writ is a final judgment within the meaning of the statute."

Moreover, in other cases this Court has reviewed on appeal judgments in mandamus proceedings where the only result of the judgment was to permit the holding of a hearing on the merits, which is precisely the situation here involved. Thus, *Pacific Coast Dairy* v. *Dept. of Agriculture,* 318 U.S. 285, which arose under the same mandamus statute as the one governing the instant proceeding, involved a judgment denying a writ of mandamus to preclude the holding of a hearing. Thus, the effect of the judgment of the California Supreme Court in that case was to permit the hearing to be held on the merits. Everything which appellees say concerning a lack of finality is equally applicable to the *Pacific Coast Dairy* case, but this Court reviewed the state court judgment in that case.

Similar situations have also been present in appeals to this Court in proceedings for writs of prohibition. Where applications are made to prohibit the holding of hearings, a denial of the writ permits a hearing on the merits just as in this case and in the *Pacific Coast Dairy* case. Yet, this Court has taken appeals from such denials of writs of prohibition in *Denver & R. G. W. R. Co.* v. *Terte,* 284 U.S. 284, and in *Michigan Central R. Co.* v. *Mix,* 278 U.S. 492.

While appellees also urge a lack of ripeness for review, it is evident, upon examination, that the argu-

ment on ripeness is simply a repetition of the argument on finality of judgment. That argument has no more force by virtue of being called "lack of ripeness for review" than it had when called "lack of final judgment." Everything that appellees say about a further hearing to be held and the possibility of raising other issues at that hearing applies equally to the cases cited above in which judgments in mandamus and prohibition proceedings were held to be final despite the fact that hearings on the merits were to follow their issuance.

The cases cited by appellees (*Radio Station WOW* v. *Johnson,* 326 U.S. 120; *Republic Gas Co.* v. *Oklahoma,* 334 U.S. 62; *Cobbledick* v. *United States,* 309 U.S. 323), have no bearing at all upon the instant situation. They involved interlocutory orders in actions which had not terminated. Here, the mandamus proceedings are separate proceedings; the judgments conclude those separate proceedings and under the settled rules, they are "final." Appellees have suggested no reason why those judgments are not "ripe for review." There is no authority which holds that the possibility of the occurrence of new and unrelated issues upon the hearing on the merits in any way embarrasses the determination of the issue raised in the separate mandamus proceedings.

Nor is appellees' argument, as to the questions which would be "saved" for review following a hearing on the merits, sound. Based as it is upon *Republic Gas Co.* v. *Oklahoma,* supra, its validity is limited to situations in which the proceeding has not been finished and the order is not "final." Here, the separate proceedings have been concluded and the judgments rendered in them are "final", as we have shown above.

It is also urged by appellees that this Court ought not to review the judgment in *Atkinson* since the Superior Court has denied on the merits their motion for a preliminary injunction. The decision of the California Supreme Court was not in any way predicated upon the fact that, in the posture of case as it then stood before that Court, the Superior Court had before it an application for a preliminary injunction rather than a trial upon the merits. Its determination will be binding upon the jurisdictional issue here involved when the action comes up for trial (Cf. *Catholic Society* v. *Madison County,* 4th Cir., 74 F. 2d 848), and therefore is not "moot."

II

THE CONSTITUTIONAL ISSUE RAISED IN THE JURISDICTIONAL STATEMENT IS SUBSTANTIAL SINCE THE CALIFORNIA COURTS LACKED JURISDICTION HERE UNDER THE APPLICABLE AUTHORITIES

The claim that the California Superior Court does have jurisdiction over the actions here involved rests upon the contention that adequate contacts exist between the subject matter of the suits and the State of California, and that these contacts constitute a basis of jurisdiction under the Fourteenth Amendment to the Federal Constitution. This argument relies upon *McGee* v. *International Life Ins. Co.,* 355 U.S. 220. In that case, without personal service, a foreign insurance company was held subject to suit on an insurance policy in the state in which the insured lived, in which the insurance contract was delivered, from which the insurance premiums were mailed and in which the insured died. Jurisdiction was predicated upon a state statute rendering foreign insurers subject to suit on insurance contracts on lives within the state.

The result in that case is related, however, to the right of a state to exclude insurers from insuring lives within the state except upon conditions reasonably satisfactory to the state. The broad authority of a state over the insurance business was emphasized by this Court in *California Auto Ass'n.* v. *Maloney*, 341 U.S. 105, 110, in which this Court declared that "the power of the state is broad enough to take over the whole business [of insurance], leaving no part for private enterprise." An application of this power appears in *Travelers Health Ass'n* v. *Virginia*, 339 U.S. 643, in which this Court held that a state could exclude a foreign insurance corporation from selling insurance contracts by mail to persons within the state without first having designated its secretary of state as agent for the service of process. Even there, this Court stated that no need existed to resort to the fiction of consent in such a case. That is precisely the situation in *McGee*. The state made foreign insurers subject to suit on policies sold and covering lives within the state. The insurer came within the statute when it solicited the sale by mail and delivered the policy by mail within the state.

Here, California is not claiming jurisdiction over a foreign corporation but over an individual trustee. And appellees are not suing on any transaction they have had with the Trustee nor on any transaction which the Trustee has had, even in part, in California.

In *Anderson*, a class action has been brought on behalf of musicians casually employed in recording music for phonograph records, two-thirds of the employment being in New York City. Plaintiffs seek to invalidate trust agreements which their employers made in New York (where their main offices are located) with the

Trustee, providing for the making of payments in New York to the Trustee, and which are largely made from the employers' bank accounts in New York. They also seek to invalidate nationwide contracts made in New York between the Federation (whose principal office is in New York) and the employers, covering largely employment in New York, under which the employers agreed to make additional payments in New York to the Trustee. Employment in California was no part of performance to or by the Trustee. He was simply receiving payments to be used to educate the public to appreciate live music with the result thereby, it was hoped, having the consequence of increasing the volume of employment available for musicians.

In *Atkinson,* the situation is even more complex. Prior to 1946, musicians were employed in making motion pictures under collective agreements which did not restrict the television use of those films. On April 1, 1946, the major producers (whose principal offices were in New York) and the Federation, agreed, in New York, upon a television restriction clause which applied to stocks of old films as well as those thereafter made, and did so to protect the employment opportunities of musicians in television throughout the country. Most producers sold their films to distributors. These distributors, commencing in 1950, began making agreements in New York with the Federation to secure releases of the television restrictions. At the same time, they entered into agreements in New York with the Trustee to make payments in New York, and, for the most part, these are made from New York bank accounts. With respect to contracts with the Federation, those made after June 1955 (and a few earlier ones thereafter amended) have required addi-

tional payments to be made in New York to the Trustee.

Thus, the Trustee has taken no action with respect to which California could require its consent. He is not being sued on any transaction he has had with the plaintiffs nor on any transaction he has carried on, in any part, in California. In *Anderson,* the most that can be said is that an employee sues, within his own state, a person outside the state because that person had a transaction outside the state with the employee's employer who operates in many states, and because that person receives payments by cross-reference to a contract made outside the state between the employer and a nationwide bargaining agent. In *Atkinson,* the employee sues, within his own state, a person outside the state because that person had a transaction outside the state with a third party who had another transaction, also outside the state, with the employee's employer who operates in many states, and because that person receives payments by cross-reference to a contract made outside the state between the employer and a nationwide bargaining agent. In no case are the services of the employee any part of the consideration furnished by or to the person outside the state. The claim is only that the nationwide bargaining agent had no right to enter into its contract with the employer and no right to induce the employer to enter into his contract with the Trustee. It is because of this alleged lack of authority that plaintiffs claim jurisdiction over the Trustee.

The alleged California "contract" which the California Supreme Court saw in the situation was the right of the employees to "reach the fruits of their

labors before they are removed from the state." (Federation Juris. Stat., App. A, p. 10). Where in either case, however, was anything leaving the state? There is nothing whatever in the record to support such a conclusion. A temporary injunction and appointment of a receiver has the effect of requiring the employer, because it does business within the state, to bring into the state monies which would not otherwise be there. And, on that basis, jurisdiction is claimed over the intangible debt owing to the Trustee under the agreements; but which, the plaintiffs contend, belongs to them. There is, too, no proof, whatever, that these monies are the fruits of the plaintiffs' labor, other than their own assertions. E.g., in *Atkinson,* where almost all the films were made and the musicians were paid before the negotiation of the television restriction clause, how do the payments, made by subsequent owners of the films, become the fruits of the labor of the plaintiffs?

In *Estin* v. *Estin,* 334 U.S. 541, and in *Vanderbilt* v. *Vanderbilt,* 354 U.S. 416, this Court held that a state having one party to a marriage as its domiciliary could not, on that basis alone and without personal service upon the other, adjudicate the property rights of the spouses. Yet, the state has far more "contact" with the spouse and the litigation than California has in the actions here involved. The scope which appellees would give to *McGee* would almost wipe out the jurisdictional limitations of the Fourteenth Amendment.

California, however, disavows any personal jurisdiction over the Trustee (Id., p. 8). It claims *quasi in rem* jurisdiction, arising from its enjoining persons obligated to the Trustee from making payment to him. The payment so enjoined is termed the *res.*

However, no specific property is here involved. The signatories to the agreements simply have a general obligation to pay in New York. There are no segregated funds, and the debt is payable from the general estate of the debtors. Under these circumstances, we have pointed out in our Jurisdictional Statement, there can be no *quasi in rem* jurisdiction where the plaintiffs claim that the absent Trustee has no rights in the intangible, but, instead, that it is owned by the plaintiffs.

Appellees urge that the precedents of this Court authorize *in rem* jurisdiction over intangibles even though the claimant within the state denies the ownership of the absent claimant. However, the entire point of *Jellenik* v. *Huron Copper Mining Co.*, 177 U.S. 1, cited by them, is that shares of stock were not an intangible since they were tangible personal property under the laws of the state of incorporation. There is no doubt that a court having physical property within its jurisdiction may adjudicate rival claims therein. This does not hold true, however, with respect to intangibles.

In *Security Savings Bank* v. *California*, 263 U.S. 282, and in *Standard Oil Co.* v. *New Jersey*, 341 U.S. 428, and in *Propper* v. *Clark*, 337 U.S. 472, the plaintiffs did not deny the ownership of the absent claimant. On the contrary, they contended that the absent claimant did own the intangible and they then claimed through the absent owner. Just as in the attachment and garnishment cases (*Chicago R.R.* v. *Sturm*, 174 U.S. 710; *Harris* v. *Balk*, 198 U.S. 215, and *Pennington* v. *Fourth Nat. Bank*, 243 U.S. 269), the absent owner in these cases had nothing to litigate with respect to his ownership of the property. It was the ownership of

the absent party that the plaintiffs contended for and which they then sought to seize. The plaintiffs were not denying the existence of that ownership and seeking to have their own claims established as rivals to the absent parties. Since the ownership of the absent parties was conceded, the state had within its jurisdiction property belonging to the absentee which could be used to require the absent party to come in and litigate the other issues raised by the plaintiffs. Where, however, the ownership of the absentee is denied, there is no property belonging to him which can be used to claim jurisdiction over him, and he does have something to litigate concerning the ownership of the intangible.

Appellees seek to explain *New York Life Ins. Co.* v. *Dunlevy,* 241 U.S. 518, as an attempt to convert *in personam* liability into *quasi in rem* liability. We have never heard the terms, *in personam* and *quasi in rem,* applied to liabilities before, but only to jurisdiction and therefore have difficulty in comprehending the distinction appellees seek to make.

The debtor in *Dunlevy* had no interest in who the proper payee was. It acknowledged its debt and was willing to pay. It interpleaded in the state in which the policy was issued, in which both rival claimants had lived and in which another phase of the litigation had begun with personal service on both rival claimants. Nevertheless, it was held that in order for the court to have jurisdiction, there had to be personal service on both rival claimants. This was so (1) because the debt was an intangible which did not become converted into a segregated fund or tangible by the payment into court of a sum equal to the debt; and (2)

because an attempt to litigate rival claims to an intangible requires the determination of personal rights, i.e., the absentee has something to litigate with respect to its ownership.

Bank of Jasper v. *First Nat. Bank*, 258 U.S. 112, is restricted by appellees to one of its alternative grounds of decision. They ignore entirely the other alternative ground for holding that no *in rem* jurisdiction existed, (Federation Juris. Stat., p. 13) namely that the state court lacked jurisdiction because plaintiffs did not claim that the bank deposit belonged to the absent claimant and thereby seek to have it applied to their claims against the absentee but, instead, claimed that the bank deposits belonged to plaintiffs. Thus, they had set up a rival claim to intangibles.

In both the *Dunlevy* and in the *Bank of Jasper* cases, this Court distinguished the garnishment and attachment case (*Pennington* v. *Fourth Nat. Bank;* supra; *Chicago R.R.* v. *Sturm;* supra; *Harris* v. *Balk,* supra) on the ground that they did not involve rival claims to intangibles whereas the situations in *Dunlevy* and in *Bank of Jasper* did. Appellees blithely ignore these explicit distinctions made by this Court and offer, in their place, obscure and untenable rationalizations.

Appellees also rely upon state court cases cited by the California Supreme Court in its opinion. Of the cases alleged to support the conclusion reached by that Court, only three either deal with the constitutional issue or so much as cite a case dealing with that issue.

Cameron v. *Penn. Mut. Life Ins. Co.,* 161 Atl. 55 (N. J.) premised jurisdiction on control over a tangible chose, the written policy contract, in an action

for reformation. That Court denied, moreover, that there could be *in rem* jurisdiction with respect to rival claims to an intangible. In *Perry* v. *Young*, 182 S.W. 577 (Tenn.) the court also predicated jurisdiction upon an insurance policy as a tangible chose. The third case, *Mutual Home Ass'n.* v. *Zenatchka*, 297 S.W. 317 (Tex. Civ. App.) dealt with a segregated fund and not with an intangible.

In *Omaha Nat. Bank* v. *Federal Reserve Bank*, 26 F. 2d 884, cited by appellees, the Court held that specific monies deposited in one account in which no transactions took place constituted specific personal property over which *in rem* jurisdiction could be exercised. Similarly, *Feuchtwanger* v. *Central Hanover Bank*, 288 N.Y. 342, held that notes wrongfully deposited in an account which never fell below the amount of those notes constituted "specific personal property" so as to permit in rem jurisdiction. It is of no consequence here whether those courts were correct in assimilating the bank accounts there involved to tangibles. The fact remains that neither court purported to rule that *in rem* jurisdiction could be exercised with respect to rival claims to bare intangibles.

Nor does *Thompson* v. *Terminal Shares*, 89 F. 2d 652, do so. That case involved the foreclosure of a lien on stock certificates which were held to be a tangible *res*.

We are aware of no state case, other than the judgments here appealed from, which has held that a state may constitutionally assert *in rem* jurisdiction over rival claims to an intangible.

III

APPELLANTS HAVE STANDING TO RAISE THE CONSTITUTIONAL ISSUE WITH RESPECT TO JURISDICTION

If the California court may not constitutionally exert jurisdiction over the actions here involved, then clearly appellants, as defendants in those actions, have standing to assert that lack of jurisdiction because the Court would then have no jurisdiction in those actions over them, as well. See *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, in which Consolidated Edison attacked the jurisdiction of the Board over the proceeding because of the absence of an indispensable party.

Since the plaintiffs seek to invalidate the provisions in the trust agreements providing for payments to the Trustee and also those in the Federation agreement providing for payments to him, the litigations seek to deprive the Trustee of his property. He is therefore an indispensable party to the suits. As this Court held in *Mallow* v. *Hinde,* 12 Wheat. 194, 198:

> "No court can adjudicate directly upon a person's right without the party being actually or constructively before the court."

And in *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, at 233, this Court held that

> "We think that the Brotherhood and its locals having valuable and beneficial interests in the contracts were entitled to notice and hearing before they could be set aside. (citations) The rule, which was applied in the cases cited to suits in equity, is not of a technical character but rests upon the plainest principle of justice, equally applicable here."

It will be noted that in these cases the court did not talk of parties to contracts but of "rights" and "valuable and beneficial interests." Certainly, the Trustee to whom the payments were due under the contracts, had "rights" and "valuable and beneficial interests."

The New York cases cited by appellees are not to the contrary. *Alexander* v. *Equitable Life Ass. Soc.*, 233 N.Y. 300, and *Gennett* v. *Smith*, 244 App. Div. 3, 278 N.Y.S. 478, hold only that where a party to a contract obligates himself to a specified performance and requires that his contractual benefits be furnished to a third person, that third person may not insist upon performance in his favor where the party to the contract has not performed his obligations under the contract. The cases do not hold, however, that the third person beneficiary is not entitled to be served and heard in any action litigating the question of performance under the contract, and it is in support of this proposition that appellees cite these cases.

Appellees also engage in the circular reasoning that, if the Federation has breached their rights, the Federation may not insist that the Trustee be a party to the adjudication. The rule is, however, as we have shown above, that the court lacks jurisdiction to determine whether a breach occurred unless it first has the indispensable parties before it. Appellees lift themselves by their bootstraps by first assuming the breach, which is the ultimate conclusion sought in the litigation, and then arguing that the court can decide that a breach exists in the absence of an indispensable party because the breach has been assumed to start with.

Nor is there validity to the assertion that the Federation cannot complain because it is not enjoined and

its property is not being taken. The question here is one of jurisdiction. If the court lacks jurisdiction over any indispensable party, it lacks jurisdiction over the action and each defendant has standing to contest jurisdiction over the action, as we have pointed out above.

CONCLUSION

The motion to dismiss the appeals or to affirm the judgments should be denied and probable jurisdiction noted.

Respectfully submitted,

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